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No. 309

IN THE

Supreme Court of the United States

(OCTOBER TERM, 1936)

S. P. KELLY, Trustee in Bankruptcy for the Carlisle Packing Company, a Corporation, Bankrupt,

Petitioner,

VS.

UNITED STATES OF AMERICA, and the COLLECTOR OF INTERNAL REVENUE for the United States of America, and the COLLECTOR OF INTERNAL REVENUE for the Collection District of Washington,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION AND SUPPORTING BRIEF

W. B. STRATTON,
RALPH O. OLSON,
GEORGE V. WHITTLE, C. P. A.,
Counsel for Petitioner.

710 Smith Tower,
Seattle, Washington.

THE ARGUS PRESS, SEATTLE

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, S. P. KELLY, Trustee in bankruptcy for the Carlisle Packing Company, a corporation, bankrupt, prays that a Writ of Certiorari issue to review a final decree of the Circuit Court of Appeals for the Ninth Circuit, entered in the above cause June

29, 1936 (R. /63) affirming a decree of the United States District Court for the Western District of Washington, Northern Division, and respectfully shows:

That the opinions of the Circuit Court of Appeals (R. /58) are reported in 83 Fed. (2d) 783, and on re-hearing (R. /63).

In the District Court (R. /38) reported in 12 Fed. Supp. 11, and decree was entered accordingly (R. 114).

JURISDICTION

That the jurisdiction of this court is invoked under section 240a of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 936) and (U. S. Code, Title 28, Sec. 347). Bankruptcy Act, Sec. 24a and 25 (U. S. Code, Title 11, Secs. 47a and 48).

First: The decision in this case is in conflict with decisions of this Court and decisions of Circuit Courts of Appeal, or the decision herein raises a new and important public question:

Whether the United States Government's Claim filed in the bankruptcy court for income taxes based on the decision of the Board of Tax Appeals is within the jurisdiction of the bankruptcy court to determine the amount and legality thereof; or is the decision of the Board of Tax Appeals *res adjudicata* on the question of the amount and legality of the tax and binding on the bankruptcy court?

Second: The decision in this case, on a question of practice, is in conflict with the decisions of this Court and decisions of Circuit Courts of Appeals:

Whether, when the record on appeal contains a pur-

ported statement of evidence treated by both the appellant and respondent as true and correct, and its form is considered to be sufficient and its veracity is unquestioned by either party, and both parties filed briefs and made oral arguments based on such statement, but which statement is not authenticated by a certificate of the United States District Judge, as required by Equity Rule 75(b), should the Circuit Court of Appeals vacate the setting and direct or permit the appellant to comply with the rule and secure from the trial court a proper certificate of authentication?

REASONS FOR GRANTING THE PETITION

1. This cause involves a question of great public importance touching the jurisdiction of the United States District Court sitting in bankruptcy to pass upon the amount and legality of a claim of the United States for income taxes, in cases where the tax had been determined by a decision of the Board of Tax Appeals made prior to the time the taxpayer was adjudicated a bankrupt.

As to this question, the case of *New Jersey v. Anderson*, 203 U. S. 483, the Supreme Court of the United States decided that the bankruptcy court had jurisdiction to re-assess or liquidate a tax; and to the same effect are the cases of: *In re E. C. Fisher Corp.*, 229 Fed. 316; *In re P. W. Williams Oil Company*, 265 Fed. 401; *In re Sheinman*, 14 Fed. (2d) 323; and, *In re George F. Redman & Co. Inc.*, 17 Fed. (2d) 128.

Either the decision of the Circuit Court of Appeals

for the Ninth Circuit in the instant case affirming the decision of the District Court for the Western District of Washington, runs counter to the above decisions and there is a conflict in regard thereto.

2. Or this decision in the instant case raises a new and important public question for that the decision of the Board of Tax Appeals becomes and is *res adjudicata* fixing the amount and legality of the income tax due from the bankrupt, and a claim for income taxes filed in the bankruptcy court based on the Board's decision cannot be decided and is beyond the jurisdiction of the bankruptcy court.

It is then a test case upon the decision of which the jurisdiction of the United States District Court sitting in bankruptcy to determine the amount and legality of the United States Government's Claims for income taxes will depend.

The Trustee objected to the allowance and payment of the claim for income taxes. The referee entertained jurisdiction, heard proof in regard to the claim for income taxes, and disallowed the same. The respondent filed its petition for revision and the referee certified the record to the U. S. District Judge and upon hearing had, the District Judge decided that the bankruptcy court was without jurisdiction to hear and determine the amount of this claim for income taxes based on a decision of the Board of Tax Appeals and ruled that the decision of such Tax Board was *res judicata* as to the bankruptcy court and reversed the decision of the referee.

The bankruptcy court, thus held that it was without jurisdiction to determine the amount and legality

of the claim for income taxes and ordered the claimed income tax paid in the sum of $20,515.52, plus interest. The Circuit Court of Appeals for the Ninth Circuit, without a decision on the merits, affirmed the District Court.

The question in issue is of great public importance. Many cases involving large sums of money and presenting the same issue are now pending and will arise in various United States Courts throughout the country. A review of the question by this Court will set at rest much doubt, avoid multiplicity of suits and promote the orderly administration and settlement of bankrupt estates.

As to the second question, pertaining to the question of practice, on appeal to the Circuit Court of Appeals for the Ninth Circuit, that court of its own motion and on a record that both relator and respondent treated as true and correct, found that there was not a compliance with Equity Rule 75(b) by reason of the failure to have the trial judge certify the statement of evidence, and, refusing a decision on the merits, affirmed the District Court.

On petition for re-hearing, appellant asked for permission to comply with the rule and that the transcript be remitted to the District Court for a certificate of authentication and be re-filed as a supplemental transcript on appeal.

Even in the Ninth Circuit Court of Appeals there is a serious conflict of decision on this question of practice. That Court in the case of *Sommer v. Rotary Lift Co.* (CCA 3) 66 Fed. (2d) 809, which presented the same question as to the proper authentication of

the record, vacated the setting on failure to comply with Equity Rule 75(b) and ordered the appellant to comply with the rule with respect to the statement of evidence. Again, a decision of the United States Supreme Court in the case of *Barber Asphalt Paving Co. v. Standard Asphalt & Rubber Co.*, 275 U. S. 372, held that to affirm a decree because Equity Rule 75(b) was transgressed was a very severe penalty to impose; and that the Circuit Court of Appeals, Seventh Circuit, should have remitted the transcript to the District Court so that opportunity might be had to comply with the rule.

A very severe penalty was imposed by the decision of the Circuit Court of Appeals, Ninth Circuit, for failure to conform to the rule that had been violated by mere inadvertence; that no opportunity was given to comply, although on a motion for re-hearing relator offered to comply; that no objection had been made for a failure to comply and the court of its own motion, instead of requiring compliance with the rule, penalized relator for such failure by affirming the lower court.

Petitioner believes that previous decisions are sound and that the bankruptcy court has plenary power to hear and determine claims in bankruptcy proceedings for income taxes under Sec. 64(a) of the Bankruptcy Act (11 U. S. C. Sec. 104a).

Wherefore, your petitioner contends that by reason of the decision in the case at bar, and the other decisions herein cited, there is a diversity of opinion, and not a uniform administration of the Bankruptcy Act as to the important questions herein presented.

Your petitioner appends hereto his brief in support of this petition.

Wherefore, your petitioner prays that a writ of certiorari may be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding said Court to certify and send to this court the record in the case therein entitled "*S. P. Kelly, Trustee in Bankruptcy for the Carlisle Packing Company, a Corporation, Bankrupt, Appellant, v. United States of America, and the Collector of Internal Revenue for the United States of America, and the Collector of Internal Revenue for the Collection District of Washington, Appellees, No. 7942,*" to the end that said case may be reviewed and determined by this court, as provided by law; and that the judgment of said Circuit Court of Appeals may be reversed and that the amount and legality of the United States Government's Claim for income taxes may be determined by the bankruptcy court.

W. B. STRATTON,
RALPH O. OLSON,
GEORGE V. WHITTLE, C. P. A.,
Counsel for Petitioner.

710 Smith Tower,
Seattle, Washington.

UNITED STATES OF AMERICA,
DISTRICT OF WASHINGTON,
COUNTY OF KING. } ss.

W. B. STRATTON being duly sworn on oath, says: That he is counsel for S. P. KELLY, Trustee in Bankruptcy, the Petitioner above named, and as such he has authority to make this verification; that said trustee is not present or available to make this affidavit; that affiant has read the foregoing petition, knows the contents thereof, and that the facts stated therein are true, to the best of his knowledge, information and belief.

W. B. STRATTON.

SUBSCRIBED and SWORN to before me this 8th day of August, 1936.

ENA HALL,
Notary Public in and for the State of Washington, residing at Seattle.

NOTARIAL SEAL.

I HEREBY CERTIFY that I have examined the foregoing petition, know the contents thereof, and it is my opinion the same is well founded and that the case is one in which the prayer of the petitioner should be granted by this Court, and that said petition is not presented for purposes of delay.

W. B. STRATTON,
Of Counsel for Petitioner.